Supreme Court, U.S.
FILED

No. 01-292 AUG 16 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

REN LABORATORIES OF FLORIDA, INC.,

Petitioner,

v.

KENNETH WEISS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

Steven D. Brown
Counsel of Record
Shannon P. Garbett
WILLIAMS, MULLEN, CLARK & DOBBINS, P.C.
1021 East Cary Street
Two James Center
Post Office Box 1320
Richmond, Virginia 23218-1320
Telephone: (804) 643-1991

Counsel for Petitioner

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTIONS PRESENTED

1. In a religious discrimination case, is the non-movant's self-serving testimony alone enough to avoid judgment as a matter of law for the employer?

2. When is an employment discrimination plaintiff required to submit evidence in addition to a prima facie case and pretext, in order to survive a motion for judgment as a matter of law under Fed. R. Civ. P. 50?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below, as required by Rule 14.1(b) of the Rules of the United States Supreme Court:

1. Kenneth Weiss, Plaintiff/Appellant;

2. REN Laboratories of Florida, Inc., a Florida corporation, Defendant/Appellee;

3. Kenneth R. Drake, Attorney for the Plaintiff/Appellant;

4. William O. Solms, Attorney for the Plaintiff/Appellant;

5. Steven D. Brown, Attorney for the Defendant/Appellee; and

6. Shannon P. Garbett, Attorney for the Defendant/Appellee.

CORPORATE DISCLOSURE STATEMENT

REN Laboratories of Florida, Inc. is now known as Gambro Healthcare Laboratory Services, Inc. Gambro Healthcare, Inc. f/k/a Gambro Healthcare Patient Services, Inc. f/k/a REN Corporation - USA is the parent corporation. There is no publicly held company that owns 10% or more of the company's stock.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE iii

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS ENTERED BELOW 1

JURISDICTION STATEMENT 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. PROCEDURAL HISTORY 3

B. STATEMENT OF FACTS 4

REASONS FOR GRANTING THE WRIT 6

I. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE ELEVENTH CIRCUIT'S REVIEW OF ONLY THE SELF-SERVING TESTIMONY FAVORING THE NON-MOVANT IN DECIDING A MOTION FOR JUDGMENT AS A MATTER OF LAW IS INCONSISTENT WITH THE APPROACH OF OTHER CIRCUITS AND THIS COURT WHICH CONSIDER THE EVIDENCE AS A WHOLE, INCLUDING THE UNDISPUTED EVIDENCE OF THE MOVANT 6

II. CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THERE IS A CONFLICT IN THE CIRCUITS WITH RESPECT TO WHEN AN EMPLOYMENT DISCRIMINATION PLAINTIFF WILL BE REQUIRED TO SUBMIT EVIDENCE IN ADDITION TO A PRIMA FACIE CASE AND PRETEXT, IN ORDER TO SURVIVE A MOTION FOR JUDGMENT AS A MATTER OF LAW 11

CONCLUSION 14

APPENDIX ..... App. i

TABLE OF AUTHORITIES

Cases: **Page(s)**

Babbar v. Ebadi,
216 F.3d 1086 (10th Cir. 2000) 8

Blow v. City of San Antonio,
236 F.3d 293 (5th Cir. 2001),
reh'g and reh'g en banc denied,
250 F.3d 745 (5th Cir. 2001) 12

Elliott v. Group Med. & Surgical Serv., et al.,
714 F.2d 556 (5th Cir. 1983), *reh'g denied*,
721 F.2d 819 (5th Cir. 1983), *and cert. denied*,
467 U.S. 1215 (1984) 7-8

Hawkins v. Pepsico, Inc.,
203 F.3d 274 (4th Cir. 2000), *cert. denied*,
531 U.S. 875 (2000), *and reh'g denied*,
121 S.Ct. 613 (2000) 7

Jackson v. E.J. Brach Corp.,
176 F.3d 971 (7th Cir. 1999) 8

Nichols v. Lewis Grocer,
138 F.3d 563 (5th Cir. 1998) 7

Perfetti v. The First Nat'l Bank of Chicago,
950 F.2d 449 (7th Cir. 1992), *cert. denied*,
505 U.S. 1205 (1992) 8

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) ..... *passim*

Rowe v. Marley Co.,
233 F.3d 825 (4th Cir. 2000) 12

Slattery v. Swiss Reinsurance America Corp.,
248 F.3d 87 (2nd Cir. 2001) 12

St. Mary's Honor Center v. Hicks,
509 U.S. 502, 113 S.Ct. 2742,
125 L.Ed.2d 407 (1993) 13

Stevens v. St. Louis Univ. Med. Ctr.,
97 F.3d 268 (8th Cir. 1996) 8

Statutes:

28 U.S.C. §1254(1) 1

42 U.S.C. §2000e-2 1

Rules:

Fed. R. Civ. P. 50 ..... *passim*

Fed. R. Civ. P. 50(a) 2

Fed. R. Civ. P. 50(a)(1) 2

Fed. R. Civ. P. 50(b) 2

Other:

Civil Rights Act of 1964, Title VII 1

9A C. Wright & A. Miller,
Federal Practice and Procedure § 2529, p. 300 (2d ed. 1995). 8

OPINIONS AND ORDERS ENTERED BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported. It is attached as an appendix. (App. at 1)[1]. The opinion of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing en banc is unreported. It is attached as an appendix. (App. at 37). The opinion of the United States District Court for the Southern District of Florida is published at 1999 WL 976072 and is attached as an appendix. (App. at 9).

JURISDICTION STATEMENT

The decision of the United States Court of Appeals for the Eleventh Circuit reversing the trial court's order granting judgment as a matter of law and affirming the trial court's conditional order granting a new trial was entered on March 8, 2001. The United States Court of Appeals for the Eleventh Circuit's decision denying Petitioner's timely petition for rehearing and rehearing en banc was entered on May 21, 2001. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit by a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute at issue in this case is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2, which says: "It shall be an unlawful employment practice for an employer - (1) . . . to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . religion . . ."

---

[1]Citations to the Appendix will be referred to as "App. at ___".

Rule 50(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . .

Fed.R.Civ.P. 50(a)(1).

Rule 50(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

Fed.R.Civ.P. 50(b).

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The trial of this matter began on February 8, 1999 in the United States District Court for the Southern District of Florida. Respondent, Kenneth Weiss' (hereinafter "Mr. Weiss") only claim at trial was that Petitioner, REN Laboratories of Florida, Inc. (hereinafter "REN"), terminated his employment on July 23, 1993 "**solely** due to his religious beliefs" in violation of Title VII of the Civil Rights Act of 1964, as amended. (App. at 12) (emphasis added). At all appropriate times at trial, REN moved for judgment as a matter of law under Fed. R. Civ. P. 50 based on Mr. Weiss' complete failure to introduce sufficient evidence to prove that his termination was the result of unlawful religious discrimination. On each occasion, the district court reserved oral argument and ruling on the motion. On February 11, 1999, the jury returned a verdict for Mr. Weiss, finding that he was terminated because of his religion. REN again moved for judgment as a matter of law, and the parties filed written motions and briefs.

On September 24, 1999, the district court granted REN's motion for judgment as a matter of law, finding that Mr. Weiss failed to introduce sufficient evidence to permit a reasonable factfinder to conclude that REN's proffered reasons for terminating him - religious harassment and insubordination - were a pretext for discrimination. (App. at 12-13). The district court also conditionally granted REN's motion for new trial, should the judgment be reversed, finding that the jury verdict was against the great weight of the evidence.

The United States Court of Appeals for the Eleventh Circuit reversed, in part, the district court's decision, holding that they were required to accept Mr. Weiss' self-serving testimony that he believed he was terminated because of his religion, that he satisfactorily performed his job and that he did not harass his subordinates or co-workers. (App. at 3).

However, the Eleventh Circuit affirmed the district court's conditional order granting a new trial, citing to-three pages of undisputed evidence and holding that the jury verdict was contrary to the great weight of the evidence. Specifically, the Eleventh Circuit determined that the evidence suggested Mr. Weiss was terminated for poor job performance, insubordination, and religious harassment of subordinates and co-workers. (App. at 5-7). A request by both parties for a panel rehearing or rehearing en banc was denied.

B. STATEMENT OF FACTS

On July 1, 1992, Mr. Weiss was hired by REN as a medical technologist at its laboratory in Fort Lauderdale, Florida. At the time he was terminated, on July 23, 1993, Mr. Weiss had been promoted to evening shift supervisor. Mr. Weiss claimed he was fired solely because he was a born again Christian. (App. at 4). Specifically, Mr. Weiss argued that despite REN's assertions, he did not harass his subordinates or co-workers with unwelcome religious discussions. Mr. Weiss denied that he offended subordinates or co-workers with his religious discussions or outreach. He also argued that the subordinates and co-workers with whom he prayed at work either consented to or requested that he pray with them. (App. at 3-4).

REN argued that Mr. Weiss was terminated because he was not competent in performing his job as a supervisor, he harassed his subordinates and co-workers based on his religious beliefs, and he was insubordinate in refusing to comply with his supervisors' admonitions not to have unwelcome discussions about religion on the job. (App. at 28). Several witnesses gave undisputed testimony regarding Mr. Weiss' religious harassment, which included Mr. Weiss showing openly lesbian employees passages in the Bible concerning homosexuality, trying to give a Muslim employee an unsolicited Bible, laying hands on employees

to cure them when they were ill, and admonishing a new subordinate employee to go to church more often. (App. at 5-7). Several REN employees testified that they complained to management about Mr. Weiss' harassing behavior, and members of REN management testified that they had warned Mr. Weiss to cease making unwelcome expressions of religious faith to subordinates and co-workers. (App. at 5,7). This testimony was undisputed by Mr. Weiss. (App. at 5). REN management also testified about Mr. Weiss' performance problems, including reporting incorrect test results and leaving his shift early. (App. at 5). Finally, REN presented undisputed testimony that Mr. Weiss was insubordinate to management because he did not heed their warnings about unwelcome religious discussions and because he had a violent outburst toward his immediate supervisor in a meeting regarding a disciplinary suspension and other job performance issues. (App. at 6).

The United States Court of Appeals for the Eleventh Circuit concluded that reasonable jurors could have found, by a preponderance of the evidence, that (1) Mr. Weiss satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in REN's decision to terminate him. (App. at 3). In so doing, the Eleventh Circuit stated that it was "bound to accept [Mr. Weiss'] version of the disputed facts in this case." (App. at 3). Applying this standard of review, the Eleventh Circuit found that Mr. Weiss' evidence, which consisted solely of his own denials that he offended or harassed subordinates and co-workers based on religion, was sufficient to overcome REN's motion for judgment as a matter of law. In its decision, the Eleventh Circuit failed to consider the undisputed evidence presented by REN that Mr. Weiss was harassing his subordinates and co-workers based on religion, he was incompetent as a supervisor, and he was insubordinate.

In reversing the judgment as a matter of law, and in relying only on Mr. Weiss' self-serving testimony that he did not harass subordinate employees and co-workers in the

face of undisputed evidence supporting REN's reasons for discharging him, the United States Court of Appeals for the Eleventh Circuit has broken from the holdings in other circuits as well as recent decisions of this Court.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE ELEVENTH CIRCUIT'S REVIEW OF ONLY THE SELF-SERVING TESTIMONY FAVORING THE NON-MOVANT IN DECIDING A MOTION FOR JUDGMENT AS A MATTER OF LAW IS INCONSISTENT WITH THE APPROACH OF OTHER CIRCUITS AND THIS COURT WHICH CONSIDER THE EVIDENCE AS A WHOLE, INCLUDING THE UNDISPUTED EVIDENCE OF THE MOVANT.

It has been settled by this Court that in order to survive a Fed. R. Civ. P. 50 motion for judgment as a matter of law in an employment discrimination case, the non-movant must put forth evidence of a prima facie case and sufficient evidence to find that the employer's asserted legitimate non-discriminatory reasons for the adverse employment action are false, i.e., proof of pretext. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). In determining that Mr. Weiss had put forth enough evidence that REN's legitimate non-discriminatory reasons for terminating him were a pretext for discrimination[2], the Eleventh Circuit only considered the self-serving testimony of Mr. Weiss that he did not harass or offend his subordinates or co-workers and that he only discussed religion with those subordinates and co-workers who

---

[2]The Court of Appeals did not address Mr. Weiss' prima facie case evidence. However, since the court found evidence of pretext, it is inferred that they also found sufficient evidence of a prima facie case.

consented to it or requested he pray with them.[3] (App. at 3-4). Accordingly, the Eleventh Circuit has taken the position that a plaintiff's self-serving testimony alone in an employment discrimination case is enough evidence of pretext to withstand a motion for judgment as a matter of law.

However, there are several circuits that align squarely against the Eleventh Circuit on this issue. In these circuits, the employment discrimination plaintiff's self-serving testimony alone is not enough, in the face of undisputed contradictory evidence, to defeat a motion for judgment as a matter of law made by a defendant employer. *See Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000), *cert. denied*, 531 U.S. 875 (2000), *and reh'g denied*, 121 S.Ct. 613 (2000) (plaintiff's conclusory allegations of racism and disagreement with performance evaluations cannot reasonably support the conclusion that her discharge was motivated by racial animus to withstand a Rule 50 judgment as a matter of law); *Nichols v. Lewis Grocer*, 138 F.3d 563, 570 (5th Cir. 1998) (plaintiff's self-serving testimony that her sex motivated her employer's action is of little value in deciding a motion for judgment as a matter of law); *Elliott v. Group Med. & Surgical Serv., et al.*, 714 F.2d 556, 564 (5th Cir. 1983), *reh'g denied*, 721 F.2d 819 (5th Cir. 1983), *and cert. denied*, 467

---

[3]The Eleventh Circuit also cites the testimony of Dr. Brian Walters and Pamela McDaniel regarding Mr. Weiss' performance as a medical technologist as supporting Mr. Weiss' position that he competently performed his job. (App. at 3). According to the Eleventh Circuit, this evidence refuted REN's argument that it terminated Mr. Weiss for poor performance. However, REN terminated Mr. Weiss for his poor performance as a **supervisor**, not as a medical technologist. Therefore, this testimony is not relevant to REN's legitimate, non-discriminatory reasons for terminating him. Nevertheless, in order to withstand REN's motion for judgment as a matter of law, Mr. Weiss was required to submit proof of pretext for <u>each</u> of REN's proffered reasons for terminating him. While arguably Mr. Weiss did not sufficiently dispute his poor performance as a supervisor, this appeal addresses the insufficiency of evidence considered by the Eleventh Circuit in deciding that Mr. Weiss did not harass his subordinates and co-workers.

U.S. 1215 (1984) (generalized testimony by an employee regarding his subjective belief that his discharge was the result of discrimination is insufficient to make an issue for the jury in the face of proof showing a nondiscriminatory reason for his discharge); *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 984-85 (7th Cir. 1999) (employee's self-serving statements about his ability are insufficient to contradict the employer's negative assessment of that ability); *Perfetti v. The First Nat'l Bank of Chicago*, 950 F.2d 449, 458 (7th Cir. 1992), *cert. denied*, 505 U.S. 1205 (1992) (employee's self-serving contradiction of a detail of employer's testimony could not support the jury verdict); *Stevens v. St. Louis Univ. Med. Ctr.*, 97 F.3d 268, 272 (8th Cir. 1996) (employee's self-serving testimony that her actions would not have warranted dismissal absent her filing of a sex discrimination charge fails to carry plaintiff's burden of proving pretext); and *Babbar v. Ebadi*, 216 F.3d 1086 (10th Cir. 2000) (plaintiff's own opinions about his qualifications and the employer's anti-Hindu animus were not sufficient to create a material factual dispute).

In addition, the Eleventh Circuit's decision is inconsistent with the holding of this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). In *Reeves*, this Court held that in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record, and "give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000), *citing*, 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2529, p. 300 (2d ed. 1995). However, in reviewing the district court's order granting judgment as a matter of law, the Eleventh Circuit stated that it was only required to consider the evidence in the light most favorable

to Mr. Weiss and to accept his version of the disputed facts in the case. (App. at 3). This decision, which specifically ignored the undisputed, unimpeached evidence of the movant, is in direct conflict with *Reeves*.

The Eleventh Circuit's decision that a discrimination plaintiff's self-serving testimony alone will create a jury question, despite undisputed, unimpeached contradictory evidence of no discrimination, sets an unfortunate precedent that this Court is called upon to recognize and remedy. In effect, the Eleventh Circuit held that the self-serving denials by Mr. Weiss of REN's legitimate non-discriminatory reasons for terminating him were enough to establish that REN lied about those reasons. Allowing this decision to stand would effectively enable every plaintiff who files a discrimination lawsuit to take his or her claim before a jury based only on his or her self-serving testimony denying the employer's legitimate non-discriminatory reasons for the adverse employment action. Such a precedent would create a maelstrom of litigation based on nothing more than the denial of an interested litigant.

If the Eleventh Circuit had applied *Reeves* and the teaching from other circuits that a plaintiff's self-serving testimony alone is not enough to create a jury question, then the court would undoubtedly have affirmed the judgment for REN and this case would not have been remanded for a new trial. In the second half of its decision affirming the district court's conditional order granting a new trial, the Eleventh Circuit did review the *entire* record, including the undisputed evidence in favor of REN, the majority of which came from disinterested third parties. (App. at 5-7). The undisputed, unimpeached facts presented by REN in support of its legitimate non-discriminatory reasons for terminating Mr. Weiss, include the following:

- Mr. Weiss received three warnings regarding his job performance;
- Mr. Weiss was twice suspended in conjunction with these warnings;
- Mr. Weiss was counseled by Dr. Brian Walters regarding his religious conversations;
- There was an unpleasant encounter between Mr. Weiss and Mary Piccola, his supervisor, wherein Mr. Weiss raised his voice to Ms. Piccola and struck his hand on her desk;
- Mr. Weiss offered an unsolicited Christian Bible to Jahved Quershi, a Muslim co-worker and subordinate of Mr. Weiss;
- Mr. Weiss knew that Mr. Quershi was a practicing Moslem and prayed regularly;
- Mr. Weiss pointed out a Biblical passage from Romans ostensibly denouncing homosexuality to an openly homosexual subordinate employee;
- Mr. Weiss laid hands on co-workers in an attempt to heal them;
- At least one subordinate or co-worker filed a complaint claiming he or she had been offended by Mr. Weiss' discussion of religion;
- Mr. Weiss was aware of REN's policy against harassment of any type and Mr. Weiss admitted that as a supervisor it was his duty to maintain a harassment-free work environment; and
- REN was genuinely concerned about Mr. Weiss' harassment, took efforts to address the complaints of harassment it received and sincerely believed that Mr. Weiss was harassing its employees.

(App. at 5-7). If the Eleventh Circuit had considered this undisputed evidence of poor performance, insubordination and harassment as part of its Rule 50 analysis in the first part of its opinion, it would have affirmed the judgment as a matter of law for REN. Mr. Weiss' self-serving testimony alone should not be enough to create a jury issue in light of the evidence in favor of REN's legitimate non-discriminatory reasons for terminating him.

II. CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THERE IS A CONFLICT IN THE CIRCUITS WITH RESPECT TO WHEN AN EMPLOYMENT DISCRIMINATION PLAINTIFF WILL BE REQUIRED TO SUBMIT EVIDENCE IN ADDITION TO A PRIMA FACIE CASE AND PRETEXT, IN ORDER TO SURVIVE A MOTION FOR JUDGMENT AS A MATTER OF LAW.

In *Reeves*, this Court noted that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, will not *always* be adequate to sustain a jury's finding of liability. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). This Court asserted that there would be instances when although the plaintiff has established a prima facie case and set forth evidence to reject the employer's explanation, "no rational factfinder could conclude that the action was discriminatory." *Id.* One example given by this Court for when this might occur is the situation where the plaintiff creates a weak issue of pretext and there is "abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* This Court stated that whether judgment as a matter of law is appropriate in a case will depend on a variety of factors, including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other

evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.*

The fact that evidence of a prima facie case and pretext will not always be enough to create a jury question has created conflict in the circuits which have rendered different decisions post-*Reeves* regarding when such a situation will occur. *See Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 93-94 (2nd Cir. 2001) (stating that a *case-by-case* examination is warranted to determine whether the prima facie showing plus pretext allows a finding of intentional discrimination); *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000) (stating that if the plaintiff proves a prima facie case and pretext her claim must go to a jury unless there is *evidence that precludes a finding of discrimination*, i.e., if no rational factfinder could conclude that the action was discriminatory); *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001), *reh'g and reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001) (stating that a case will get to a jury if a plaintiff has proved her prima facie case and has presented sufficient evidence of pretext and there are no *unusual circumstances* that would prevent a rational factfinder from concluding that the employer's reasons for the adverse employment action taken against her were discriminatory). Finally, in the Eleventh Circuit, in light of the dearth of evidence cited as support of pretext in this case, a weak prima facie case and minimal evidence of pretext (solely consisting of plaintiff's self-serving testimony) will always be adequate to withstand a Rule 50 motion for judgment as a matter of law.

Concurring with this Court's opinion in *Reeves*, Justice Ginsburg recognized that a potential conflict might arise as a result of this portion of the decision. She described the potential conflict as follows:

> I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond [a prima facie case and pretext] in order to survive a motion for judgment as a matter of law. . . . Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). But the inference remains - unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law . . . that discrimination could not have been the defendant's true motivation.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 154-155 (2000).

This is exactly the "appropriate case" referred to by Justice Ginsburg. With this case, this Court has the opportunity to define more precisely the circumstances in which a plaintiff will be required to submit evidence in addition to a prima facie case and pretext to survive a motion for judgment as a matter of law. If Mr. Weiss can get to a jury based only on the self-serving evidence cited by the Eleventh Circuit, there is no real case-by-case analysis espoused by this Court in *Reeves*, and judgment as a matter of law is nonexistent in employment discrimination cases. Assuming arguendo that Mr. Weiss presented a prima facie case and evidence of pretext, when considering the undisputed evidence supporting REN which may properly

be considered at this juncture (which the Eleventh Circuit failed to consider), it is clear that *at best* Mr. Weiss presented a weak issue of pretext (his self-serving testimony) and there is undisputed, uncontradicted evidence that no discrimination occurred. *See* Outline of REN's undisputed facts at p. 10 herein. This is a case where the plaintiff's evidence is not adequate to sustain a jury's finding of liability. The teaching from *Reeves* has to be that plaintiffs need more evidence than Mr. Weiss had to get to a jury. This Court should grant certiorari in this case to resolve the conflict in the circuits, foreseen by Justice Ginsburg, regarding when an employment discrimination case is not appropriate for a jury.

CONCLUSION

This case presents important questions regarding the role of a plaintiff's self-serving testimony in an employment discrimination case. There is a conflict in the circuits regarding the efficacy of such evidence. For this reason, review by this Court is warranted. In addition, this case is important in light of this Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.* Guidance by the Court is needed regarding the application of the *Reeves* holding to cases where the evidence of a prima facie case and/or pretext is weak or is rebutted by substantial undisputed evidence by an employer. For this reason as well, review by this Court is warranted. This Court should grant certiorari to review these important matters, reverse the Eleventh Circuit's decision regarding REN's motion for judgment as a matter of law and enter judgment on behalf of REN consistent with the order in the district court.

Respectfully submitted,

Steven D. Brown
Counsel of Record
Shannon P. Garbett
WILLIAMS, MULLEN,
CLARK & DOBBINS, P.C.
1021 East Cary Street
Two James Center
Post Office Box 1320
Richmond, Virginia 23218-1320
Telephone: (804) 643-1991

Counsel for Petitioner

TABLE OF CONTENTS
Appendix to the Petition

Page

Opinion
United States Court of Appeals for
The Eleventh Circuit
entered March 8, 2001 ..... App. 1

Opinion
United States District Court
Southern District of Florida
entered September 24, 1999 ..... App. 9

Order of
The Honorable Monroe G. McKay
Re: Denying Petition for Rehearing *En Banc*
United States Court of Appeals for
The Eleventh Circuit
entered May 21, 2001 ..... App. 37

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14355

D.C. Docket No. 94-06333-CV-NCR

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 08 2001

THOMAS K. KAHN
CLERK

KENNETH WEISS,

Plaintiff-Appellant,

versus

REN CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Entered: March 8, 2001

Before EDMONDSON, BLACK and MCKAY[1], Circuit Judges.

---

[1]Honorable Monroe G. McKay, U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

Appellant Kenneth Weiss appeals the district court's grant of Appellee REN Laboratories' post-trial motion for judgment as a matter of law and, in the alternative, the district court's grant of Appellee's motion for a new trial. Appellant seeks reinstatement of the jury verdict and remand for entry of judgment, as well as an award of costs and attorney's fees. Appellant brought suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, claiming religious discrimination was the cause of Appellant's termination from employment with Appellee. The jury returned a verdict in favor of Appellant. While we reverse the district court's grant of judgment as a matter of law, we affirm the district court's grant of a new trial and remand for a new trial.

I. JUDGMENT AS A MATTER OF LAW

This Court reviews de novo a district court's grant of judgment as a matter of law, applying the same legal standards as those used by the district court. *See Taylor v. Runyon*, 175 F.3d 861, 865 (11th Cir. 1999).

Judgment as a matter of law is warranted "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . ." Fed. R. Civ. P. 50(a)(1). We have explained:

> If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions, then such a motion was due to be denied and the case was properly submitted to the jury.

Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989) (footnote omitted). "The question is whether or not reasonable jurors could have concluded as this jury did based upon the evidence presented." *Quick v. Peoples Bank of Cullman County*, 993 F.2d 793, 797 (11th Cir. 1993) (quoting *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679 n.1 (11th Cir. 1984)). In making this assessment, we consider the evidence in the light most favorable to the non-moving party, here, Appellant. *See Combs v. Plantation Patterns*, 106 F.3d 1519 1526 (11th Cir. 1997). In considering a grant of judgment as a matter of law, a court may not weigh the evidence or assess the credibility of witnesses. *See Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir. 1996).

We conclude reasonable jurors could have found, by a preponderance of the evidence, that (1) Appellant satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in Appellee's decision to terminate Appellant.[2] We reach this conclusion due to the requirements under the judgment as a matter of law standard that we not weigh the evidence and that we consider the facts in the light most favorable to Appellant.

Under this standard, we are bound to accept Appellant's version of the disputed facts in this case. With respect to Appellant's competence in performing his job, we must accept Dr. Brian Walter's testimony that Appellant was a "technically sound . . . medical technologist." We also must accept Pamela McDaniel's testimony that all laboratory employees make mistakes "once in a while," and that Appellant is "an accurate and good technical employee."

With respect to whether Appellant harassed his co-workers, the standard of review requires that we accept Appellant's assertion that he never discussed religion with a co-worker when Appellant knew or should have known that such a discussion was offensive to that individual. We

---

[2]This is the three-part, special verdict delivered by the jurors here.

also must accept the following of Appellant's statements: Jahved Quershi, a Moslem co-worker and, later, subordinate of Appellant, rejected Appellant's offer of a Bible saying "no thank you," and Appellant did not insist Quershi take the Bible; Appellant never told Jane Christy, an openly homosexual co-worker, that she would burn in hell or that he would cure her homosexuality; co-workers with whom Appellant prayed consented to or requested their praying together and were not offended by Appellant's behavior; and Appellant's only interaction with Claudette Cannatella at the farewell party was his agreeing with Virginia Savino's remark that "it's good to attend church."

With respect to whether religion made a difference in Appellant's termination, we must accept Appellant's testimony that he believed he was terminated because of his religion.

Viewing the facts in the light most favorable to Appellant, and absent any weighing of evidence, we reverse the district court's grant of judgment as a matter of law for Appellee.

II. NEW TRIAL

The standard we use in reviewing the grant of a motion for a new trial differs markedly from that in reviewing the grant of a motion for judgment as a matter of law. First, as a general matter, we review motions for a new trial under the abuse of discretion standard. *See, e.g., Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987). Where the district court has granted a motion for a new trial, "our review is broader and requires a stringent application of the [abuse of discretion] standard" in order "to protect the litigant's right to a jury trial." *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984).

Second, while a court reviewing a motion for judgment as a matter of law may not weigh the evidence, a court reviewing a motion for a new trial is permitted to weigh the evidence. *See Bazile v. Bisso Marine Co., Inc.*, 606

F.2d 101, 105 (5th Cir. 1979) (citation omitted).[3] A new trial is warranted if the jury verdict is contrary to the great weight of the evidence. *See Rosenfield,* 827 F.2d at 1497-98; *Williams v. City of Valdosta,* 689 F.2d 964, 973 (11th Cir. 1982). In weighing the evidence, courts must examine both the evidence favoring the moving party and that favoring the jury verdict. *See id.* A court may conclude a jury verdict is contrary to the great weight of the evidence even if the record contains some evidence supporting the jury verdict. *See Ard v. Southwest Forest Indus.,* 849 F.2d 517, 521 (11th Cir. 1988). Courts reviewing motions for a new trial, therefore, are afforded much greater leeway in assessing evidence than are courts reviewing motions for judgment as a matter of law. *See Dudley v. Wal-Mart Stores, Inc.,* 166 F.3d 1317, 1320 n.3 (11th Cir. 1999) (the law applies a less stringent standard to motions for a new trial than to motions for judgment as a matter of law).

In weighing the evidence here, we need not look any further than the undisputed facts in this case. *See generally Ard,* 849 F.2d at 521. With respect to Appellant's competence in performing his job, it is uncontroverted that Appellant received three warnings regarding his job performance. These warnings were issued on October 5, 1992 (failed to perform a hepatitis test), February 17, 1993 (reported an incorrect HIV result), and July 14, 1993 (left his shift early). It is also undisputed that these three warnings were written. It is uncontroverted that Appellant was twice suspended in conjunction with warnings (February 17, 1993 and July 14, 1993). The parties agree that, in August 1992, Appellant was counseled by Dr. Walters regarding, at least in part, his religious conversations ("sex, religion, and politics are best kept out of the workplace"). Many of these incidents occurred after Appellant's promotion in November 1992. Further, the parties agree that there was an

---

[3]*In Bonner v. City of Prichard),* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

unpleasant encounter between Appellant and Mary Piccola on July 21, 1993. While most of the details about this encounter are disputed, the parties agree Appellant raised his voice to his superior and struck his hand on her desk.

With respect to whether Appellant harassed his co-workers, both parties agree that Appellant offered a Christian Bible to Jahved Quershi, a co-worker and, later, a subordinate of Appellant. While Appellant testified that Quershi politely declined the Bible, Appellant also knew that Quershi was a practicing Moslem and prayed regularly. Appellant should have known that a practicing Moslem would, at the very least, not appreciate Appellant's unsolicited offer of a Christian Bible. With his knowledge of Quershi's religion, Appellant's gesture takes on tones of proselytization.

The parties are also in agreement that Appellant pointed out a Biblical passage from *Romans* regarding homosexuality to Christy, an openly homosexual subordinate employee. The Biblical passage Appellant cited indisputably views homosexuality in a negative light, calling homosexuality "vile," "unseemly," "erro[neous],"and requiring "recompence [sic]".[4] Since Appellant's discussion of homosexuality was admittedly couched in this non-approving framework, it follows that Appellant's portrayal of homosexuality was negative and, therefore, inappropriate in a work setting. Appellant's behavior is particularly unacceptable when directed toward subordinates, such as Quershi and Christy, since Appellant should have known his subordinates might not object to their supervisor's overtures, concerned that he might penalize them.

---

[4]Appellant testified he cited a passage from "Roman I," and there is only one passage in the first chapter of *Romans* that refers to homosexuality. The full passage reads: "For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet." *Romans* 1:26-27 (King James).

Next, the parties agree that Appellant "laid hands" on co-workers in an attempt to heal them. Specifically, Appellant testified that, on at least two occasions, he unsolicitedly asked sick co-workers if he could pray for or with them.[5] Initiating a prayer session in a place of employment - even if co-workers agree to participate - is not prudent behavior. Co-workers may have felt pressured to acquiesce to Appellant's overture to "lay hands" on them. The workplace is a highly inappropriate setting to be making such overtures in the first place, especially without knowledge of the religious inclinations of one's co-workers.

Finally, both parties agree that Appellant's supervisors informed him on April 21, 1993, that at least one co-worker had filed a complaint, claiming he or she had been offended by Appellant's discussion of religion.

We conclude the jury's verdict that religion made a difference in Appellant's termination is contrary to the great weight of the evidence, which strongly suggests Appellant was terminated for poor job performance, insubordination, and religious harassment of co-workers, as alleged by Appellee. We reach this conclusion after considering Appellant's self-serving testimony that he was terminated because of his religion.

III. CONCLUSION

"If the appellate court reverses the judgment [as a matter of law], nothing in this rule precludes it from determining that the appellee is entitled to a new trial . . . ." Fed. R. Civ. P. 50(d). Viewing the facts in the light most

---

[5]One incident involved Pamela McDaniel and Mary Piccola, and the other involved a unidentified woman "with blood in her eye". While Appellant portrays these two prayer sessions as consensual, Joan Caruso testified that, in a separate incident, Appellant unsolicitedly placed his hands on her with the intent of healing her. Appellant allegedly did so after Caruso mentioned to employees in a lounge that she had a migraine headache. Appellant did not recall this alleged incident.

favorable to Appellant and refraining from weighing evidence, as we must, we conclude the district court erred in granting Appellee's motion for judgment as a matter of law. Focusing on the undisputed facts and weighing the evidence, we conclude, however, the district court did not abuse its discretion in granting Appellee's motion for a new trial. We emphasize we do not take a position on the propriety of granting a motion for judgment as a matter of law or a motion for a new trial following the new trial ordered here. The subsequent trial will generate a new record and may reveal new evidence, thereby demanding a different result than that reached here.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED FOR A NEW TRIAL.

81 FEP Cases 73
81 Fair Empl.Prac.Cas. (BNA) 73
(Cite as: 1999 WL 976072 (S.D.Fla.))

KENNETH WEISS,
Plaintiff

v.

REN LABORATORIES OF FLORIDA,
Defendant

No. 94-6333-CIV-ROETTGER

U.S. District Court Southern District of Florida

Entered: September 24, 1999

BNA Labor Relations Reporter Headnote -
FEP Cases
CIVIL RIGHTS ACT OF 1964 Religion -- Discharge
C 108.1118 C108.1180
S.D.Fla., 1999.

Employer lawfully discharged born-again Christian employee who was harassing co-workers about their personal lives and religious beliefs, since it had legal duty to keep its workplace free of harassment, and it produced abundant evidence that he repeatedly condemned two heterosexual and two homosexual female co-workers about their lifestyles, he continually tried to convert Muslim subordinate, he attempted to "lay hands" on employees without their permission, he gave out unsolicited Bibles, and he harassed new employee on her first day about her religious practices; employer was genuinely concerned about his harassment in that its handbook proscribes harassment of any type, electronic mail message from corporate office directed manager to instruct him that employer did not tolerate harassment of any kind and that such conduct must cease, and it repeatedly warned him that his discussions were unwelcome.

WEISS v. REN LABORATORIES OF FLORIDA
81 FEP Cases 73
BNA Labor Relations Reporter Headnote - FEP Cases
CIVIL RIGHTS ACT OF 1964 Religion -- Discharge
C108.1118 C108.1180
S.D.Fla., 1999.

Mere denial by born-again Christian employee, who was discharged following complaints that he was harassing other employees on basis of religion, that his religious discussions were harassing in nature is not sufficient to cast doubt on employer's motive for discharge; he produced no evidence that employer did not honestly believe that he was harassing its workers and no testimony or exhibit that would demonstrate weakness, implausibility, inconsistency, incoherency, or contradiction in its stated reason.

WEISS v. REN LABORATORIES OF FLORIDA
81 FEP Cases 73
BNA Labor Relations Reporter Headnote - FEP Cases
CIVIL RIGHTS ACT OF 1964 Religion -- Discharge
C108.1118
S.D.Fla., 1999.

Abundant evidence supports assertion by employer that it discharged for insubordination born-again Christian employee who continually harassed co-workers about their personal lives and religious beliefs, where its management counseled him several times about unwelcome and disruptive nature of his actions yet he did not modify his behavior, he was personally insubordinate to supervisor when he made angry table-pounding response to her attempt to counsel him about leaving his shift early, and his only evidence of pretext was his own denial that he had commented on one co-worker's religion and testimony of another employee that this co-worker did not appear upset by comment that she should attend church more often; his evidence is not sufficient to overcome considerable evidence of insubordination.

WEISS v. REN LABORATORIES OF FLORIDA
81 FEP Cases 73
BNA Labor Relations Reporter Headnote - FEP Cases
CIVIL RIGHTS ACT OF 1964 Religion -- Discharge
C108.1118 C108.7212
S.D.Fla., 1999.

Jury verdict in favor of discharged born-again Christian medical technologist was so contrary to evidence of his harassing, disruptive, and insubordinate behavior that new trial would be warranted if federal district court's judgment as matter of law in favor of employer is overturned, where employer promoted him after it was fully aware of his religious beliefs and after it had cautioned him about religious harassment, but he thereafter continued to harass several employees about their sexual preferences, dating habits, living arrangements, and personal faiths and continued to disregard company policy, and he did not meaningfully dispute material facts bearing on employer's intent; he condemned two female homosexual co-workers on basis of religion to point that one contemplated suing employer for harassment, he condemned two female heterosexual employees for their dating habits and living arrangements, he repeatedly held unwanted religious discussions with Muslim employee who often felt compelled to leave room and even considered resigning, he ignored several informal warnings from management, he received written warning for failing to run blood specimen for hepatitis and written warning and suspension for reporting incorrect HIV result, he attempted to lay hands on unwilling employees, he disrupted work by praying over broken machine rather than calling repairman, he received another written warning and suspension for leaving his shift early when staff was overwhelmed with work, he was belligerent and hostile to supervisor, and he harassed new employee on first day of work about her religious practices.

WEISS v. REN LABORATORIES OF FLORIDA
81 FEP Cases 73

William O. Solms, Jr. (Solms & Price, P.A.), Miami, Fla., for plaintiff.

Steven D. Brown (Williams, Mullen, Christian and Dobbins), Richmond, Va., for defendant.

Full Text of Opinion

BARRY S. SELTZER, Magistrate Judge

*1 THIS MATTER is before the Court on Defendant's Motion for Judgment as a Matter of Law or in the Alternative a New Trial. (DE 206.) Kenneth Weiss ("Plaintiff") claimed that Ren Laboratories of Florida, Inc. ("Defendant") terminated his employment on July 23, 1993 "solely due to his religious beliefs," in violation of Title VII of the Civil Rights Act of 1964, as amended. Pursuant to the consent of the parties, the undersigned conducted the trial of this matter on February 8 through February 11, 1999, following which the jury returned a verdict for Plaintiff.

Defendant moved for judgment as a matter of law at the close of Plaintiffs case-in-chief, at the close of all the evidence, and following the jury's verdict. The Court deferred ruling on the motions and, following the verdict, informed the parties that it would entertain full briefing on the motions. On April 9, 1999, Defendant filed its Memorandum of Law in Support of Defendant's Motion for Judgment as a Matter of Law or in the Alternative a New Trial. On May 30, 1999, Plaintiff filed his opposition memorandum, and on May 10, 1999, Defendant replied thereto.

Having reviewed the parties' respective memoranda and thoroughly considered the record herein, the Court finds that Plaintiff failed to introduce substantial evidence to permit a reasonable factfinder to conclude that two of Defendant's proffered reasons for termination--religious

harassment and insubordination - - were not what motivated its conduct. Accordingly, the Court GRANTS Defendant's Motion for Judgment as a Matter of Law. Further, should this judgment be reversed, the Court conditionally GRANTS Defendant's Motion for a New Trial as the jury verdict was against the great weight of the evidence.

I. STATEMENT OF FACTS

On February 8, 1999, the Court commenced the trial. Both parties presented opening statements to the jury, followed by their respective cases-in-chief and by a brief rebuttal. Plaintiff's presentation consisted of four lay witnesses, including Plaintiff Weiss, and one expert; only the four lay witnesses testified to liability issues. Defendant's presentation consisted of eight witnesses; only six of the witnesses testified to liability Issues. [FN1]

> FN1. Plaintiff's expert witness (Dr. John R. Williams) and two of Defendant's witnesses (Diana Bryzicki and Alice Bering) testified to damages issues only. Their testimony, therefore, is not relevant for purposes of this Order.

A. Plaintiff's Case-In-Chief

1. Virginia Savino

Virginia Savino is Plaintiff's former wife. They were married in July 1993, just prior to Plaintiff's termination, and divorced in July 1997. Savino testified about a discussion involving herself, Plaintiff, and Claudette Cannatella on July 22, 1993, the day preceding Plaintiff's termination. This was Cannatella's first day of work, and she had met Plaintiff for the first time that evening. According to

Savino, she commented on the cross that Cannatella was wearing. Cannatella reportedly responded that she did not attend church regularly but should do so. Savino stated that Plaintiff voiced agreement. In Savino's opinion, Cannatella did not appear to be upset.

2. Pam McDaniel

Pam McDaniel was the only member of Defendant's management team to be called during Plaintiff's case-in-chief. As the former day shift supervisor, she knew Plaintiff well. McDaniel's testimony revealed the following details of Plaintiff's religious harassment of co-workers, subordinates, and supervisors:

*2. Plaintiff harassed several gay employees, including Joan Caruso and Jane Christy, on the basis of religion, and they complained to McDaniel in the Summer/Fall of 1992 and the Spring of 1993;

- Plaintiff repeatedly held unwelcomed religious discussions with Javed Quershi, a Muslim employee, and Plaintiff failed to stop when requested to do so; Plaintiff then attempted to give him a Bible, which he refused; Quershi complained to McDaniel about this harassing conduct;
- in August 1992, McDaniel was present with Jackie Creola for an oral warning given to Plaintiff about unwanted religious discussion with co-workers;

- in November 1992, Defendant promoted Plaintiff from medical technologist to evening shift supervisor due to his good technical skills, despite the previous oral counseling about religious harassment;
- in February 1993, Plaintiff prayed over a broken coagulant machine instead of calling the service repairman, which unnecessarily disrupted the work for the following shift;
- in April 1993, McDaniel and Mary Piccola (the laboratory manager) orally counseled Plaintiff after they had received several employee complaints about his religious harassment; Plaintiff, however, did not take the warning seriously, sarcastically inquiring whether he was permitted to talk about baseball with employees; Piccola gave Plaintiff a written warning regarding his harassing conduct;
- several co-workers and subordinates were afraid to complain about Plaintiff because he was their supervisor and, therefore, could affect the terms and conditions of their employment;
- on July 21, 1993, Plaintiff became violent and insubordinate toward Piccola at a counseling session attended by McDaniel; Plaintiff pounded his fist and appeared to be going over a desk to strike Piccola; Piccola touched his face to keep from getting hit; thereafter, McDaniel was afraid to be in the same room with Plaintiff.

McDaniel testified that Defendant permitted non-harassing speech in the workplace, as long as it did not interfere with the job. Employees, including Plaintiff, who engaged in consensual religious discussions were neither counseled nor disciplined. But McDaniel stated that many of Plaintiff's conversations about religious matters were not consensual; they were harassing and offensive, requiring Defendant's intervention.

3. Claudette Cannatella

Cannatella testified that on her first day at work she was introduced to Plaintiff at a farewell party for another employee, and she was informed that he (Plaintiff) was the night supervisor. According to Cannatella, Plaintiff commented upon her crucifix and then proceeded to inquire whether she was a Christian and whether she attended church. Cannatella replied that she was a Catholic and had not been to church for a long time. Plaintiff then repeatedly urged her to attend church. According to Cannatella, Plaintiff just went "on and on," making her feel uncomfortable. On her way home from work that evening, Cannatella called Debbie Correggio, a supervisor, and asked whether she would have to deal with such harassment on a daily basis. Correggio conveyed the complaint to Mary Piccola, the laboratory manager. Piccola later inquired of Cannatella about the incident.

4. Plaintiff Kenneth Weiss

*3 Plaintiff testified that he became a born-again Christian in 1977 and between 1989 and 1991 received the "baptism of the Holy Spirit." Plaintiff testified that as a born-again Christian he believes that he is required to witness and share his religious beliefs with others, including co-workers.

On July 16, 1992, Plaintiff was hired by Defendant as a medical technologist on the evening shift at its Fort Lauderdale laboratory. He admitted receiving an employee handbook and stated that he was familiar with and understood its provisions concerning acceptable workplace conduct. He acknowledged that he was required to comply with Defendant's policies and procedures, including its anti-harassment policy. He never complained to Defendant that its policies and procedures conflicted with his religious beliefs.

Soon after going to work for Defendant, Plaintiff began discussing his religious beliefs with co-workers, subordinates, and supervisors and giving unsolicited Bibles. He admitted showing Jane Christy, an openly gay subordinate employee, biblical passages concerning homosexuals. Plaintiff also attempted to "lay hands" on people at work to pray for them, and he did "lay hands" on a broken coagulant instrument during Ids shift in front of other employees.

Plaintiff admitted that his August 1992 he was orally counseled by Dr. Brian Walters, who told him that "sex, religion, and politics are best kept out of the workplace." In 1992, he also received a written warning for failing to perform a hepatitis test. Nonetheless, in November 1992, Defendant promoted Plaintiff to a supervisory position.

Plaintiff acknowledged that as a supervisor he was in a position to evaluate employees, approve raises, and authorize terminations. Furthermore, he was a role model for other employees and was responsible for maintaining a harassment-free workplace. Yet, in his supervisory capacity, he received a written warning and suspension for reporting out an incorrect HIV result in February 1993. And he acknowledged an April 1993 counseling with Mary Piccola and Pam McDaniel, at which time they informed him of a complaint from an employee who had been offended by his religious discussions. Plaintiff apologized and stated that it would not happen again. Plaintiff denied that Piccola had showed him an e-mail from Defendant's headquarters,

stating that the company did not tolerate harassing behavior. Plaintiff acknowledged that a few months after the April counseling, he received a written warning and suspension for leaving his shift early on July 14,1993. Finally, Plaintiff admitted that at a July 21, 1993 meeting with Piccola and McDaniel he slammed his hand down on the table.

Plaintiff also testified about the events concerning Claudette Cannatella at the July 22, 1993 farewell party. He stated that his wife. Virginia Savino, had questioned Cannatella about the cross around her neck and that Cannatella did not appear to be upset. According to Plaintiff, when he came to work the following day, Piccola terminated him.

*4 Weiss believes that he was terminated solely because of his religion. He bases his conclusion upon the capitalized word "RELIGION" in the termination notice. Among other things, the notice states that Plaintiff was terminated for "discussing RELIGION with other employees." He stated that his claim for religious discrimination pertained only to his July 23, 1993 termination.

Weiss testified that he recognized there is a time and place for religious discussion. He stated that he never discussed religion when he knew it was offensive to others. He denied ever receiving a written warning that his religious activities might affect his employment. He also denied telling Jane Christy, an openly gay employee, that she would burn in hell. And he denied commenting on Cannatella's cross or the church she attended.

Following Plaintiff's testimony, he rested his case. Defendant moved for judgment as a matter of law and this Court deferred argument and reserved ruling. Defendant then proceeded to its case-in-chief.

B. Defendant's Case-In-Chief

1. Evelyn Roby

Roby was a supervisor during Plaintiff's employment at Defendant's laboratory. Roby testified that she personally had several consensual conversations with Plaintiff about religion. But Roby further testified to witnessing Plaintiff initiate unwelcomed and harassing religious discussions with Jane Christy and Carol Kelsy in the laboratory lunchroom. According to Roby, she witnessed Plaintiff telling Christy, one of his subordinates, that according to the Bible she was going to go to hell because she was gay. Christy became very upset at Plaintiff's comment and stated that she was going to inform Piccola. Furthermore, Plaintiff upset Carol Kelsy by condemning her dating habits; he did so "every time he talked to her." Kelsy reportedly also took her grievances to Piccola.

2. Javed Quershi

Javed Quershi is a Muslim employee who worked in very close proximity to Plaintiff, both as a co-employee and as his subordinate. Quershi testified that most of the time Plaintiff spoke to him about his religion; Plaintiff would condemn all other faiths. Quershi stated that he repeatedly attempted to stop Plaintiff, but Plaintiff refused to stop. On one occasion, Plaintiff handed Quershi a Bible, which Quershi refused. Quershi testified that he was offended by and resented Plaintiff's incessant, unwelcomed expressions of religious faith. As Quershi explained: "What you need to understand you are trying to get your work done and he constantly pounding, pounding, pounding, you know, the only way was to get out of the room for a couple of minutes." Because Plaintiff refused to stop, Quershi ultimately brought his complaints about Plaintiff's harassing conduct to Pam McDaniel in the Fall of 1992 and

to Mary Piccola in 1993. According to Quershi, had Defendant not taken some action to stop Plaintiff's religious harassment, he (Quershi) would have quit his job.

3. Joan Caruso

Joan Caruso was an inventory technician on the day shift at the time Plaintiff was the evening shift supervisor. Because Caruso was working a substantial amount. of overtime, she and Plaintiff would often be at the laboratory at the same time. Caruso testified about several harassing experiences she had had with Plaintiff. According to Caruso, Plaintiff would come by her office and initiate unwelcomed religious discussion three or four times per week. She stated that Plaintiff had told her that she was going to go to hell because she was a homosexual and that God did not love her. Plaintiff had also told her that he was a prophet and that she should change her lifestyle to be right with God. Against her wishes, he even attempted to lay hands on her to cure her headaches. According to Caruso, the discussions made her "feel horrible,. . . . like [she] was being prosecuted for something that was really none of Ken Weiss' business." Although she repeatedly told Plaintiff that she did not wish to discuss religion with him, he persisted. He stopped only after she threatened to call the company's telephone number for reporting harassment.

*5 Caruso also testified to witnessing Plaintiff harass Lisa Styles and Jane Christy (Caruso's roommate). On at least a dozen occasions, Plaintiff told Lisa Styles that she was living in sin and that God did not approve. Styles finally reacted by bluntly informing Plaintiff that it was none of his business. Styles also complained to McDaniel.

According to Caruso, she and others were initially reluctant to complain to management about Plaintiff's harassment because he was a supervisor. Notwithstanding this reluctance, Caruso did complain to Jackie Creole in the Fall of 1992, to Mary Piccola in 1993, and to Pam McDaniel on several occasions in 1992 and 1993. She specifically

informed Piccola that Plaintiff had called her "an abomination." She testified that if Defendant had not put an end to Plaintiff's harassment, she would have sued the company for allowing it to continue and not protecting her rights.

4. Dr. Brian Walters

Dr. Brian Walters is the director of microbiology and immunology at Defendant's laboratory. According to Dr. Walters, Pam McDaniel had received complaints from staff members about Plaintiff discussing religion in an excessive manner. He testified that he warned Plaintiff in August 1992 about his unwelcomed expressions of religious faith to various coworkers. Dr. Walters told Plaintiff it was not a good idea to talk about sex, religion, and politics in the workplace. Dr. Walters stated that Plaintiff agreed with him and was apologetic. Shortly thereafter, in November 1992, Defendant promoted Plaintiff to evening shift supervisor.

5. Debbie Correggio

Debbie Correggio has worked for Defendant for nine years as a laboratory coordinator. Correggio testified that she had received a call from Claudette Cannatella at approximately 10:00 p.m., on July 22, 1993. Cannatella was upset because Plaintiff had reportedly been pushy about her not attending church on a regular basis and about the cross she wore around her neck. According to Correggio, Cannatella was bothered by Plaintiff's religious discussions and wanted to know if she was "going to have to deal with [similar comments from Plaintiff] every day." Correggio stated that she relayed Cannatella's complaints to Mary Piccola, the laboratory manager, because she considered the matter serious.

Mary Piccola

Mary Piccola was hired as a vice president of operations at Defendant's laboratory in January 1993 and was responsible for all issues arising in the workplace. Piccola made the final decision to terminate Plaintiff in July 1993.

Piccola testified about Defendant's employee handbook, policies, and procedures, including the company's anti-harassment policies. Piccola stated that she spoke to Plaintiff on several occasions about complaints she had received from staff members concerning his religious harassment. Piccola testified that Plaintiff personally offered her a Bible in February 1993, which she declined to accept; Plaintiff, however, refused to take it back. Plaintiff also asked if he could lay hands on her to cure her cold; Piccola declined. Piccola told Plaintiff that he could discuss religion with those who were willing to do so but that he could not discuss religion with those who indicated that they did not wish to do so. She warned Plaintiff that he could be terminated if he did not stop harassing those not wishing to partake in these discussions.

***6** Piccola identified an e:mail that she received from Defendant's corporate headquarters concerning the proper way to handle Plaintiff's harassing conduct. The e:mail was prompted by Pam McDaniel's report that Plaintiff had been harassing staff members. The human resources personnel at corporate headquarters instructed Piccola to speak to Plaintiff immediately to stop the harassment; otherwise, Defendant risked liability. Piccola and McDaniel (in April 1993) then met with Plaintiff. Piccola told Plaintiff that corporate policy prohibited his harassing employees. She reiterated that he could engage in consensual religious discussions but could not discuss religion with those who indicated that they did not wish to do so. And she again warned Plaintiff that he could be terminated if he continued to harass.

Piccola related a July 1993 incident in which Plaintiff had left his shift early, even though a significant amount of work remained. Plaintiff was suspended for his breach of policy, and he received a written warning for it on July 21, 1993. Piccola and McDaniel then met with Plaintiff to discuss the suspension. According to Piccola, Plaintiff slammed his fist down on the desk, frightening her and making her jump. Piccola stated that she and Plaintiff stood up and that she was unable to leave the room. At several times, she told Plaintiff that he needed to leave. The incident so startled McDaniel that she would not return to talk to Plaintiff. The following day, Piccola, this time accompanied by Andrew Grant, met with Plaintiff again. Piccola informed Plaintiff that his violent behavior would not be tolerated; Plaintiff apologized.

On July 23, 1993, Debbie Correggio advised Piccola that Plaintiff reportedly had been discussing religion aggressively with Claudette Cannatella. Piccola spoke to Cannatella, who stated that she did not want to come to work every night and be forced to deal with such religious discussions; they made her feel very uncomfortable. Piccola then discussed Cannatella's complaint with Plaintiff to verify the allegations. Piccola testified that Plaintiff did not deny discussing religion with Cannatella. According to Piccola, the Cannatella incident was "a recurrence of a problem that had been discussed many times with [Plaintiff]."

Piccola stated that Plaintiff's termination was based not solely on his conversation with Cannatella, but on his on-going religious harassment, as well as his insubordination and poor performance. With respect to the termination notice that she prepared, Piccola testified that her practice is not to list every reason on the notice because the employee file references prior warnings and counselings. She explained that she wrote "RELIGION" in capital letters on the notice because Plaintiff had been counseled several times that he could not engage in unwanted or unwelcomed religious discussions, yet he

continued to do so anyway; the Cannatella incident was merely the last straw. Finally, she testified that her termination of Plaintiff had nothing to do with his being a born-again Christian or with any of the consensual religious discussions he may have had with other employees.

*7 At the conclusion of Piccola's testimony, Defendant rested its case. Defendant then renewed its motion for judgment as a matter of law, arguing that the record contained no evidence of intentional religious discrimination. This Court again deferred argument and reserved ruling.

C. Plaintiff's Rebuttal Case

Plaintiff was the only witness who testified during his rebuttal case. He was asked approximately ten questions by his counsel, and defense counsel conducted no cross-examination. His rebuttal testimony addressed whether he should have been disciplined for leaving work early in July 1993 and for calling a physician on a panic value reading in the early morning hours. Plaintiff also testified that he always obeyed and allowed the rules of the laboratory and never signed a written warning concerning his harassing employees.

After Plaintiff rested, Defendant again renewed its motion for judgment as a matter of law, and this Court again deferred argument and ruling. The parties then proceeded to closing argument, and the Court instructed the jury.

The jury returned a verdict in favor of Plaintiff. Defendant again moved for judgment as a matter of law. The Court stated that it would not then require Defendant to place all of its reasons on the record and requested that the parties prepare a briefing schedule for all post-trial motions.

II. STANDARD OF REVIEW

Pursuant to Rule 50 of the Federal Rules of Civil Procedure, a judgment as a matter of law is warranted if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). A court reviewing a motion for judgment as a matter of law must

> consider all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party. If the facts and inferences point overwhelming in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion [is] properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach different conclusions, then such a motion [is] to be denied. . . .
>
> Combs v. Plantation Patterns, 106 F.3d 1519, 1526 [73 FEP Cases 232] (11th Cir. 1997), cert. denied. 522 U.S. 1045, 118 S.Ct. 685, 139 L.Ed.2d 632 [77 FEP Cases 448] (1998) (quoting Carter v. City of Miami, 870 F.2d 578, 581 [49 FEP Cases 1014] (11th Cir. 1989) (emphasis added). Accordingly, the nonmoving party "must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law"; "there must be a substantial conflict in the evidence to support a jury question." Id. (quoting Carter, 870 F.2d at 581) (internal quotation marks omitted).

Here, Plaintiff's religious discrimination claim is grounded in circumstantial evidence. Under the framework established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 [5 FEP Cases 965] (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct 1089, 67 LEd.2d 207 [25 FEP Cases 113] (1981), Plaintiff had the initial burden of establishing a prima facie case of discrimination. Combs, 108 F.3d 1527-28 (citations omitted). Establishing a prima facie case creates a presumption of unlawful discrimination. Id. at 1528 (citation omitted). The effect of the presumption is to shift to the defendant the burden of producing legitimate nondiscriminatory reasons for the challenged employment action. Id. (citations omitted). Once the defendant satisfies this intermediate burden of production, the presumption of discrimination drops from the case. Id. at 1528 (citation and quotation marks omitted). The plaintiff then has the opportunity to come forward with evidence "sufficient to permit a reasonable factfinder to conclude" that the defendant's explanation is pretextual. Id.

***8** "Pretext . . . means a lie, specifically a phony reason for some action." Helland v. South Bend Community Sch. Corp., 93 F.3d 327, 330 [71 FEP Cases 1621] (7th Cir. 1996), cert. denied, 519 U.S. 1092, 117 S.Ct. 769, 138 L.Ed.2d 715 [74 FEP Cases 1440] (1997) (citation and internal quotation marks omitted). "Because a Title VII claim requires intentional discrimination, the pretext inquiry focuses on whether the employer's stated reason was honest, not whether it was accurate." Id. As articulated by this Circuit, the focus is on whether "the employer's proffered legitimate reasons were not what actually motivated its conduct." Combs, 106 F.3d at 1538 (citing Cooper - Houston v. Southern Ry. Co., 37 F.3d 603, 605 [73 FEP Cases 291] (11th Cir. 1994)). The "court must evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate

reasons for its action that a reasonable factfinder could find them unworthy of credence. "Id. (citation and internal quotation marks omitted). If the (nonmoving) plaintiff does not "undermine the veracity of [the defendant's] claimed reliance" on its stated reason(s), then the defendant is entitled to judgment as a matter of law. Id. at 1544 (Black, J., concurring).

Where the record does not support granting a judgment as a matter of law, it may nonetheless support granting a new trial if the jury verdict is contrary to the "great weight" (not merely the greater weight) of the evidence. See Rosenfield v. Wellington Leisure Prods., Inc., 827 F.2d 1493, 1497-98 [44 FEP Cases 1523] (11th Cir. 1987); Williams v. City of Valdosta, 689 F.2d 984, 973 (11th Cir. 1982); Arnold v. Rayonier, Inc., 181 F.R.D. 549, 553 (S.D. Ga. 1998). The law applies "a less stringent standard. . . to a motion for a new trial than to a motion for judgment as a matter of law." Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1320 n.3 [79 FEP Cases 136] (11th Cir. 1999) (citation omitted). And unlike motions for judgment as a matter of law, motions for a new trial permit courts to weigh or reexamine the evidence. See Rabun v. Kimberly-Clark Corp., 678 F.2d 1053, 1060 (11th Cir. 1982); Arnold, 181 F.R.D. at 553. In weighing the evidence, courts examine not only the evidence favoring the jury verdict, but the evidence favoring the moving party as well. Williams, 689 F.2d at 973. Courts, however, may not substitute their own credibility choices and inferences for those of the jury. Id. at 973-74 n.7; Arnold, 181 F.R.D. at 553.

After weighing the evidence, a court may conclude that a jury verdict is contrary to the great weight of the evidence--thereby warranting a new trial-- even though the record does contain some evidence supporting the verdict. See Ard v. Southwest Forest Indus., 849 F.2d 517, 521 [47 FEP Cases 407] (11th Cir. 1988) (district court properly granted new trial in age discrimination case; although plaintiffs had introduced some evidence showing that employer's proffered reason for discharge was pretextual,

the evidence was weak and attenuated). But in assessing a new trial motion, a court must give greater deference to a jury verdict where the case involved "simple issues, highly disputed facts, and . . . an absence of 'pernicious occurrences.'" Williams, 689 F.2d at 974. By contrast, a trial court has greater freedom to independently evaluate a jury verdict where the case involved "complex issues, facts not highly disputed, and events arguably marred by error. "Id.

III. ANALYSIS

A. Judgment as a Matter of Law

*9 Assuming, arguendo, that Plaintiff established a prima facie case of religious discrimination, the production burden shifted to Defendant to proffer legitimate, nondiscriminatory reasons for the July 23, 1993 termination. Defendant proffered that it terminated Plaintiff for religious harassment and insubordination, [FN2] both of which are legitimate, nondiscriminatory reasons. See, e.g., Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1019-1020 [72 FEP Cases 747] (4th Cir. 1996), cert denied, 522 U.S. 815, 118 S.Ct. 58, 139 L.Ed.2d 21 [74 FEP Cases 1792] (1997) (upholding termination of Evangelical Christian for "sending personal, distressing letter to coworkers' homes, criticizing them for assertedly ungodly, shameful conduct"; plaintiff supervisor had acknowledged responsibility to "promote harmony in the workplace"); Helland, 93 F.3d at 330 (defendant's claims that plaintiff's performance was poor and he defied repeated warnings against interjecting his religious beliefs into the classroom were legitimate, nondiscriminatory reasons to defeat plaintiff's claim of religious discrimination); Fouraker v. Publix Super Markets, Inc., 959 F.Supp. 1504 (M.D. Fla. 1997) (plaintiffs failure to follow employer's directive to cease certain conduct was considered insubordination and a legitimate, nondiscriminatory reason for termination); Woodbury v. Sears

Roebuck & Co., 901 F. Supp. 1560, 1564 (M.D. Fla. 1995) (insubordination is a legitimate, nondiscriminatory reason for termination).

> FN2. Defendant also proffered that it terminated Plaintiff for poor performance. The Court, however, need not address this issue as Plaintiff failed to undermine the veracity of Defendant's other stated reasons for the termination. See Combs, 106 F.3d at 1543 (a plaintiff must discredit "all" of the defendant's reasons for its actions).

Once Defendant satisfied its production burden, "the presumption of discrimination drop[ped] from the case and the factual inquiry proceed[ed] to a new level of specificity." Combs, 106 F.3d at 1528 (citation omitted). To prevent entry of judgment as a matter of law, Plaintiff was then required to put forth sufficient evidence showing that each of Defendant's proffered reasons for the termination was not "the real reason for the adverse employment decision." Id. (citations omitted). Plaintiff, however, failed to do so.

Defendant produced abundant evidence supporting its assertion that it terminated Plaintiff for religious harassment: he repeatedly condemned two homosexual women (Caruso and Christy) (one of whom was his subordinate) and two heterosexual women (Kelsy and Stiles) about their personal lifestyles; he continually tried to convert a Muslim subordinate (Quershi); he attempted to lay hands on employees; he gave unsolicited Bibles (and refused to take one back); and he harassed a new employee (Cannatella) on her first day at work about her religious practices. Plaintiff's behavior put Defendant in a position of possibly losing employees to resignation or, worse, being sued by employees for tolerating a religiously hostile work environment.

Defendant had not any the right, but a legal duty to keep its workplace free of religious harassment. See Weiss v. United States, 595 F.Supp. 1050, 1055- 58 [36 FEP Cases 1] (E.D. Va. 1984) (employee prevailed on claim of hostile work environment religious harassment based upon discriminatory comments/conduct by co-workers and supervisor); EEOC Decision Number 72- 1114, 4 FEP Cas. (BNA) 842, 843 (1972), 1972 WL 4024, at *1 (EEOC Feb. 18, 1972) (charging parties claimed that supervisor was preaching his religious beliefs to them at work; EEOC stated that "employer is responsible for the actions of its supervisors. . . Respondent's failure to provide a working environment free of religious intimidation is violative of Section 703(a) of Title VII.")).

*10 The evidence established that Defendant was genuinely concerned about Plaintiff's harassment. Defendant's own handbook proscribes harassment of any type, and the record contains ample testimony from Piccola, McDaniel, and even Plaintiff himself that workplace harassment was well understood to be unacceptable at the laboratory. Defendant's concern was also evidenced by an e:mail forwarded to Piccola by the corporate office. The e:mail directed Piccola to instruct Plaintiff that Defendant does not tolerate harassment of any kind and that such conduct must cease.

The evidence further established that Defendant took efforts to address the many complaints of harassment it received. Plaintiff admitted that he was counseled by Dr. Walters in the Fall of 1992 to avoid religious discussions and that he was told by Piccola in April 1993 of a complaint about his religious harassment, for which he apologized. Pam McDaniel testified that she was involved in a counseling session with Plaintiff as early as August 1992 regarding this very issue. And both Piccola and McDaniel testified to counseling Plaintiff in April 1993; they informed him of several complaints by subordinates and co-workers regarding his unwelcomed, harassing religious discussions. Piccola stated that she had also cautioned Plaintiff on other occasions. These repeated warnings not only placed Plaintiff on notice, but they underscore the sincerity of Defendant's concern. When

Defendant finally terminated Plaintiff, it cited the harassing discussions and the previous warnings in the termination notice.

Plaintiff failed to cast sufficient doubt on the veracity of Defendant's assertion that it terminated him for religiously harassing employees. Plaintiff produced no evidence to suggest that Defendant did not honestly believe he was harassing its workers. Plaintiff did not produce any testimony or exhibit that would demonstrate a weakness, implausibility, inconsistency, incoherency, or contradiction in Defendant's stated reason. See Combs, 106 F.3d at 1538. And although Plaintiff denied that his religious discussions were harassing, his mere denial, standing alone, is insufficient for a reasonable jury to find that Defendant's proffered reason for terminating him was a pretext for religious discrimination. See Washington v. Vogel, 880 F.Supp. 1542, 1544 (M.D. Fla. 1995) (mere denial by driver stopped by police officer that he committed traffic violation was insufficient by itself for reasonable jury to find that traffic stop was pretext for national origin discrimination). Were it otherwise, any plaintiff could "get to the jury" on a discrimination claim simply by denying the defendant's stated reason for its action. Id. As this Circuit has stated, "[that the plaintiff calls into question some assertions made by the defendant in support of defendant's justification is not enough. The plaintiff must call into question the veracity of the defendant's ultimate justification itself. "Isenbergh v. Knight -Ridder Newspaper Sales, 97 F.3d 436, 444 [72 FEP Cases 735] (11th Cir. 1996), cert. denied, 521 U.S. 1119, 117 S.Ct. 2511, 138 L.Ed.2d 1014 [74 FEP Cases 1791] (1997) (citation omitted) (emphasis added). Nor does Plaintiff's stated belief that he was terminated "solely due to his religious beliefs" affect the result. "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [the defendant] has offered extensive evidence of legitimate, nondiscriminatory reasons for its actions." Id.

*11 Defendant also introduced abundant evidence supporting its assertion that it terminated Plaintiff for insubordination. Defendant's management counseled Plaintiff on several occasions about his inappropriate religious discussions in the workplace, but the warnings went unheeded. Not only did Plaintiff disregard several informal warnings from management, but he also disregarded Piccola's more formal directive of April 21, 1993 to cease his religious harassment. Piccola cited Plaintiff's continued disregard of these warnings, which culminated in his harassment of Cannatella, as evidence of his insubordination. She memorialized this in the termination notice: "[D]espite at least 2 separate warnings, Mr. Weiss continues to discuss RELIGION with REN employees." Further, Plaintiff was personally insubordinate to Piccola--as evidenced by his angry, table-pounding confrontation--when she attempted to counsel him about his leaving the shift early.

Plaintiff failed to cast doubt on the veracity of Defendant's assertion that it terminated him for insubordination. The only evidence presented by Plaintiff was his own denial that he commented on Cannatella's church and cross and Savino's testimony that Plaintiff had merely voiced his agreement that Cannatella should attend church more often and that Cannatella did not appear to be upset. Although Plaintiff may disagree with the wisdom of Defendant's assessment of his religious discussion with Cannatella, his disagreement does not establish pretext. As this Circuit has stated, a plaintiff "may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where . . . the reason is one that might motivate a reasonable employer." Combs, 106 F.3d at 1543. In Defendant's view, Plaintiff's conversation with Cannatella, coming only a day after his angry confrontation with Piccola, manifested a continuing disregard for company policy; it was the last straw. Plaintiff, therefore, failed to produce any evidence showing that the claim of "insubordination" was a front or ruse for unlawful religious discrimination. See Isenbergh, 97 F.3d at 444.

To establish pretext, Plaintiff had to adduce "substantial evidence," see Combs, 106 F.3d at 1526, showing that Defendant "did not honestly believe in its proffered explanation" that it terminated Plaintiff for religious harassment and insubordination. Arnold, 181 F.R.D. at 557 (citing Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 [56 FEP Cases 1246] (11th Cir. 1991) (stating that the inquiry is "whether the employer gave an honest explanation of its behavior")). Plaintiff, however, failed to produce any evidence from which a rational factfinder could find that Defendant's stated "reasons were not what actually motivated its conduct." Combs, 106 F.3d at 1538 (citation and internal quotation marks omitted). Accordingly, judgment as a matter of law is warranted.

B. New Trial

*12 Should this judgment be reversed, this Court would grant Defendant's motion for a new trial because the jury verdict was contrary the great weight of the evidence. [FN3] Here the great weight of the evidence shows that Plaintiff was terminated, not because of his religion, but because of his religious harassment of co-workers and subordinates and for insubordination. The evidence shows that after it was fully aware of Plaintiff's religious beliefs, and even after it had cautioned him about religious harassment, Defendant promoted Plaintiff to a supervisory position. But the evidence further shows that he thereafter continued to religiously harass several employees about their sexual preferences, dating habits, living arrangements, and personal faiths and that he continued to disregard company policy.

FN3. Federal Rule of Procedure 50(c)(1) states in pertinent part:

> If a renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial.

The record contains the following evidence of Plaintiff's workplace behavior:

- he condemned two female homosexual employees on the basis of religion, telling one that she would bum in hell and calling her "an abomination"; that employee contemplated suing Defendant had they not stopped the harassment;
- he condemned two female heterosexual employees on the basis of religion, critizing their dating habits and living arrangements;
- he repeatedly held unwanted religious discussions with a Muslim employee in which he condemned all faiths other than his own; the Muslim employee often felt compelled to leave the room to end the discussions and even considered resigning his job;

- he received oral warnings in August 1992 (from McDaniel and Jackie Creola), In the Fall of 1992 (from Dr. Walters), and again in April 1993 (from McDaniel and Piccola) regarding unwanted religious discussions with co-workers and subordinates; he also received several informal warnings from Piccola;
- he received a written warning in October 1992 for failing to run a blood specimen for hepatitis during his shift;
- he received a written warning and suspension in February 1993 for reporting an incorrect HIV result;
- he attempted to lay hands on unwilling employees;
- he disrupted work in February 1993 by praying over a broken coagulant machine rather than calling a service repairman;
- he received a written warning and suspension in July 1993 for leaving his shift early when the staff was overwhelmed with work;
- he was belligerent and hostile to Piccola during a July 21, 1993 meeting; and
- he harassed a new employee on her first day at work about her religious practices.

Plaintiff did testify that his religious discussions were not harassing, and he disputed the merit of his warnings and suspensions. But the issue that was dispositive of this case was neither simple nor the subject of highly disputed testimony. The dispositive issue was the complex one of Defendant's

intent – whether Defendant terminated Plaintiff because it intended to discriminate against him on the basis of his religion or because it honestly believed he had been insubordinate and religiously harassing employees. And the facts material to the issue of Defendant's intent were not highly disputed: Plaintiff did commit the acts giving rise to the suspension; Plaintiff did discuss religion in the workplace with some frequency; at least some employees did take offense and reported their displeasure to management; and management did express its concern to Plaintiff by warning him about this behavior. See Williams, 689 F.2d at 974 (court has greater latitude in reviewing jury verdict where issues are complex and facts not highly disputed). Plaintiff, therefore, did not meaningfully dispute the material facts bearing on Defendant's intent and its stated reasons for termination.

*13 The great weight of the evidence supports Defendant's assertion that it terminated Plaintiff, not because of his religion, but because it honestly believed that he had been religiously harassing other employees and had been insubordinate to management. See Arnold, 181 F.R.D. at 557. Accordingly, the Court concludes that a new trial would be warranted should the judgment be reversed. See Fed. R. Civ. P. 50(c)(1).

IV. CONCLUSION

For the foregoing reasons, the evidence of record did not allow a reasonable jury to find that Defendant's proffered legitimate, nondiscriminatory reasons were not the real reasons for Plaintiff's termination. Accordingly, the Court GRANTS Defendant's Motion for Judgment as a Matter of Law. Further, should this judgment to be vacated, this Court conditionally GRANTS Defendant's Motion for a New Trial as the jury verdict was contrary to the great weight of the evidence.

DONE AND ORDERED at Fort Lauderdale, Florida this 24th day of September 1999.

END OF DOCUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14355-CC

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAY 2 1 2001

THOMAS K. KAHN
CLERK

KENNETH WEISS,

Plaintiff-Appellant,

versus

REN CORPORATION,

Defendant-Appellee.

.....

On Appeal from the United States District Court for the Southern District of Florida

.....

Entered: May 21, 2001

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19 _, _____ F.2d _____).

Before: EDMONDSON, BLACK and MCKAY*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5) the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ S. Black
UNITED STATES CIRCUIT JUDGE
*Honorable Monroe G. McKay, U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

ORD-42 (6/95)